EDITOR'S NOTE

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87-237 (1)

No.

Supreme Court, U.S.
FILED
JUN 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT FOR THE
UNITED STATES OF AMERICA
TERM

KEITH MILTON RHINEHART and the AQUARIAN FOUNDATION,

Appellants,

vs.

TRIBUNE PUBLISHING COMPANY, INC., et al.

Appellees.

ON APPEAL FROM THE
WASHINGTON STATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

Counsel for Appellants

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40 pp

QUESTIONS PRESENTED

1. Did the Trial Court Order pursuant to Washington Civil rules to comply with discovery and the accompanying protective order impermissibly regulate the Plaintiffs-appellants Constitutional Right to Freedom in the Exercise of their Religion when less restrictive alternatives were available to achieve the same objectives?

2. Was dismissal of the Plaintiffs-Appellants case pursuant to a Washington Civil Rule for noncompliance with a discovery order a denial of Due Process of Law under the United States Constitution?

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REFERENCE TO DECISION BELOW

The Washington State Supreme Court approved the Plaintiffs-appellants' Motion for Extension of Time, but denied their Petition for Review to that court on March 27, 1987. That decision was reported at Rhinehart v. KIRO, Inc., 108 Wn.2d 1008 (1987).

GROUNDS FOR JURISDICTION

Nature of Proceedings: The Plaintiffs Keith Milton Rhinehart and the Aquarian Foundation filed suit against the Defendants for Defamation and Invasion of Privacy. The case was dismissed for failure to comply with the State Superior Court's Discovery order on September 19, 1983. The Washington Court of Appeals affirmed the trial court's decision on August 4, 1986 and denied the Plaintiffs Motion

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for Reconsideration on September 11, 1986. The Washington State Supreme Court denied the Plaintiffs Petition for Review on March 31, 1987.

Jurisdiction is conferred on this court by 28 U.S.C. 2101(c). Appeal lies to the United States Supreme Court if the Appellants contend that the application of State Court Rules violated the appellants' rights under the United States Constitution.

The Supreme Court will reexamine the Appellants First Amendment Rights.

PROVISIONS AND STATUTES INVOLVED IN APPEAL

U.S. Constitution First Amendment:

Congress shall make no law respecting an establishment of religion or preventing the free exercise thereof.

WA CR 37(b)(2)(c) provides:

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permit discovery... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part therof, or rendering a judgment by default against the disobedient party.

THE FACTS

The Defendants' KIRO AND KOMO each made a series of broadcasts during December, 1979 characterizing the Aquarian Foundation as a group set up to defraud its members and Reverend Keith Milton Rhinehart as a fraud, evader of the law and child molester.

During discovery, KIRO, through interrogatories to the Plaintiffs, requested three religious films/videotapes and

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extensive church documents. On August 11, 1983 the trial court granted the Defendants one copy of each of the films/ videotapes and the right to discover all church files. At this point, Aquarian Foundation had already produced for the Defendants over 100 documents after over 100 man hours of research through their own files.

The Court denied the Plaintiffs Protective Order and signed instead a more limited Protective Order. The Plaintiffs Protective Order provided the Defendants a copy of all relevant portions of the videotapes after allowing the Defendants to view them in a setting which preserved their sacred nature. Under the Proposed Order, once the Defendants identified relevant portions of any tape, the court would then view that portion

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to confirm its relevance. The proposed order struck a balance between the Plaintiffs free exercise of religion rights and the Defendants discovery rights. The court's order allowed the Defendant a complete copy of the tape while preventing the Defendants from using the materials produced for commercial purposes. This order protects Freedom of Association rights but does nothing to protect the religious and sacred nature of the tapes.

In addition at the time of this order the trial judge stated that substantial discovery had occured.

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QUESTIONS TIMELY RAISED ON APPEAL

Federal Constitutional questions were raised orally during argument on the Motion for a Protective Order on August 11, 1983 and on the Motion for Dismissal on September 19, 1983. They were raised in written briefs to the Washington Court of Appeals and the Washington Supreme Court.

QUESTIONS ARE SUBSTANTIAL

The Right to Free Exercise of Religion is protected by the First Amendment and the right to Due Process of Law is protected by the 14th Amendment of the Constitution. Both are important and substantial rights.

1. FREE EXERCISE

The Protective order entered on September 19, 1983 did protect the Plain-

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tiffs-appellants rights to privacy and freedom of association, but it did not protect their first Amendment right of free exercise of their religion.

> Congress shall make no law respecting an establishment of religion or preventing the free exercise thereof.

U.S. Constitution First Amendment.

The United States Supreme Court has interpreted this to mean that government can never regulate religious beliefs and may only regulate religious actions under certain conditions. Sherbert v. Verner, 374 US 398, 10 L Ed 2d 965 (1963).

> The Free Exercise Clause means that the government is prohibited from interfering with or attempting to regulate any citizen's religious beliefs, from coercing him to affirm beliefs repugnant to his religion or conscience and from directly penalizing or discriminating against him for holding beliefs contrary to those held by anyone else.

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The Plaintiff-Appellants believed the tapes invloved were sacred religious articles. The Washington Supreme Court previously ruled that Reverend Keith Milton Rhinehart is a spiritual leader of a religious group, the Aquarian Foundation. Rhinehart v. The Seattle Times, 98 Wn. 2d 226, 654 P.2d 673 (1982), aff'd 467 U.S. 20, (1984). The Protective Order proposed by the Plaintiffs would protect their right to free exercise of religion by allowing viewing of the tapes in a supervised setting while allowing the Defendant-Appellees to make copies of all pertinent portions. The trial court's limited protective order only protected a portion of the Plaintiffs-appellants' constitutional rights.

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2. DUE PROCESS

Dismissal of the Plaintiffs' case against Defendants KIRO and KOMO was inappropriate because it violated Plaintiffs' Due Process rights.

Dismissal of a case for failure to comply with discovery requests violates the due process clause when the Plaintiffs' refusal to comply was not willful or deliberate, dismissal goes beyond the necessities of the situation, and the Plaintiffs would not have benefitted from his noncompliance. Societe Internationale, 357 U.S. 197, 2L. Ed.2d 1255, (1958). Dorsey v. Academy Moving and Storage, 423 F2d 858 (9th Cir., 1970), Dismissal cannot be a mere punishment. Societe Internationale, at 210.

The Plaintiffs inability to comply with discovery was neither willful nor

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deliberate. In the case at bar the trial court found prior to dismissal that the Plaintiffs had substantially complied with discovery requests. In addition, the Plaintiffs made a reasonable showing of inability to comply because of their religious beliefs. Plaintiffs refusal to comply was far from willful and deliberate.

Dismissal of the case went beyond the necessities of the situation. Societe Internationale, supra. The Plaintiffs proposed a protective order that would protect their own First Amendment Rights and the Defendants Discovery Rights.

Plaintiffs would not have benefitted from their own noncompliance. Plaintiffs' inability to produce the ordered discovery will allow the court

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to draw inferences infavorable to the Plaintiffs. Societe Internationale, supra. Under Civil Rule 37(b)(2)(A and B), the failure to provide requested materials provides that either the facts in those materials are established or that the plaintiffs cannot support or oppose designated claims or offenses.

In this case, because Plaintiffs religious beliefs prevent them from producing the discovery, they are deprived of its use. The lack of the evidence may cause problems with the adequacy of Plaintiffs' proof of their own case, Dorsey, supra, e.g. their scientific basis for the practice of certain religious phenomena.

By dismissing the Plaintiffs' case after their failure to comply with discovery orders, the trial court violated the Plaintiffs' right to due process.

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The Plaintiffs noncompliance was not willful or deliberate; dismissal goes beyond the necessities of the situation; and the Plaintiffs will not benefit from their own noncompliance if no sanction is imposed.

The Plaintiffs present substantial questions for review. The Plaintiffs Right to Free Exercise of Religion was violated by the United Protective Order entered by the trial court. Their right to Due Process of Law was violated by the trial court's premature dismissal.

QUESTIONS OF CONSTITUTIONAL INTERPRETATION

These are important for the U.S. Supreme Court's consideration. They go to the heart of the purposes of Constitutional protections, to allow access to court process to all on the merits

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of their claims. Therefore, the Plaintiffs-appellants respectfully request that the U.S. Supreme Court accept jurisdiction of these questions.

Dated this 26th day of May, 1987.

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Attorney at Law

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IN THE COURT OF APEALS OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation, Appellants, WILLIAM R. POWERS and LILA LEE POWERS, husband and wife, d/b/a POWERS STUDIO, Plaintiffs, vs. KIRO, INC.; FISHER BROADCASTING, INC., and KOMO; JOHN SANDIFUR and JANE DOE SANDIFUR, husband and wife; Respondents, TRIBUNE PUBLISHING COMPANY, INC.; RICHARD SYPHER and JANE DOE SYPHER, husband and wife; JOAN DUMENCHUK and JOHN DOE DUMENCHUK, wife and husband; and STARR ELLIOTT, Defendants.	NO. 13848-1-I DIVISION ONE FILED AUG. 4, 1986

GROSSE, J. -- This is an appeal by Keith Milton Rhinehart and the Aquarian Foundation from a dismissal with prejudice of their case

APPENDIX A:
ORDER AFFIRMING TRIAL COURT

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for their failure to comply with certain discovery orders. Appellants allege that the disclosure of the materials in question would violate their constitutional right to the free exercise of religion. Appellants also argue that even if the order of discovery was proper, dismissal of their case with prejudice was inappropriate. We find neither contention meritorious and affirm the trial court.

Keith Milton Rhinehart (Rhinehart) is the spiritual leader of the religious group The Aquarian Foudantion (Foundation), both of whom brought an action for defamation and invasion of privacy because of various news stories broadcast by KIRO and KOMO. Rhinehart and the Foundation refused to disclose certain of the information requested, including three videotapes. One tape was produced and aired on Japanese

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public television in 1958. The second tape was aired in Washington on public television by KTVW in 1962. The third tape was a recording of a religious ceremony performed by Rhinehart at the Walla Walla penitentiary before approximately 800 prisoners. Additionally, KIRO was granted access to the Foundation's files on articles mentioning apportation, a phenomenon peculiar to Rhinehart's religious practices.

Pursuant to CR 26, the trial court issued an order compelling Rhinehart and the Foundation to comply with these requests. KIRO was also awarded terms. By its order, the trial court limited the use of the information to preparation of the defenses absent further order of the court. The information gained by means other than the discovery process was not subject to the protective order. Prior to the issuance of the orders

APPENDIX A:
ORDER AFFIRMING TRIAL COURT

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compelling discovery, the trial court balanced the competing interests of the parties and their respective rights as required by Rhinehart v. Seattle Times Co., 98 Wn. 2d 226, 654 P.2d 673 (1982). Aff'd, ___ U.S. ____, 81 L.Ed. 2d 8, 104 S. Ct. 2199 (1983).

The trial court did not violate Rhinehart's or the Foundation's freedom to exercise religion by compelling discovery. Rhinehart's assertion to the contrary is without merit. The cases cited in support of the proposition deal with restrictions on freedom to practice a religion and are thus inapposite. The discovery process in the instant case does not impinge on Rhinehart's or the Foundation's freedom to practice religion.

Rhinehart and the Foundation are willing to allow KIRO and KOMO to view the "sacred" tapes. Their main objection is

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to their copying. It is thus not against their religious principles that these tapes may be viewed by persons other than members (such a position would be hard to maintain since two of the tapes had already been broadcast to the public at large). Rather, the appellants fear that the tapes will be disseminated to the public at large thus putting members at risk. It was precisely because of this argument that the trial court issued the protective order. The arguments propounded by appellants are really ones that should be made in support of an invasion of privacy action. Having lost this argument already, it appears that appellants are substituting religious freedom in its place. See Rhinehart v. Seattle Times Co., supra, wherein the Washington State Supreme Court dismissed the Plaintiffs' cross appeal in which it was alleged that disclosure of the

APPENDIX A:
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membership lists violated the members' right of privacy. In that case the court found that Rhinehart had failed to show that the protective order was inadequate to prevent any abuse threatened by disclosure to the Seattle Times. There, as here, appellants are "attempting to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information." Rhinehart, at 257-58. As the Washington State Supreme Court stated:

> The protective order shields the plaintiffs from abuse of the discovery privilege. The more extensive protection which they desire is within the discretion of the trial court in a proper case; but the plaintiffs are not entitled to such an order as a matter of right. There is no showing that the protective order is inadequate to prevent any abuse threatened by the defendants.

Rhinehart, at 257. Neither is there such a showing in the case at bar.

Appellants contend that the United States

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Supreme Court's failure to rule on the issue of protective orders in its review of the Rhinehart case leaves that issue open. Such an argument is specious. The Supreme Court's failure to rule specificallv on that issue does not change the present law of the State of Washington as enunciated by the Washington State Supreme Court in the Rhinehart decision.

Having thus disposed of the constitutional issue, we turn now to the question of whether dismissal of the case was appropriate. The remedy for a party's failure to comply with discovery lies within the discretion of the trial court. CR 37(b)(2)(C) provides in pertinent part:

> (b) **Failure To Comply With Order**
> . . .
>
> (2) Sanctions by Court in Which Action Is Pending. If a party... fails to obey an order to provide or permit discovery, . . . the court in

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> which the action is pending may make such orders in regard to the failure as are just. and among others the following:
>
> . . .
>
> (C) An Order Striking out pleadings or parts thereof,. . .

(Emphasis Added.)

A trial court's exercise of the broad discretion under CR 37 to impose sanctions for noncompliance with a discovery order will not be overturned unless there is a manifest abuse of discretion. Associated Mortgage Investors v. G.P. Kent Constr. Co., 15 Wn. App. 223, 548 P.2d 181 (1979). upholding dismissal of Plaintiffs' action because of their willful and deliberate noncompliance with the trial court's discovery order.

In the case at bar, the discovery process consumed 21 months. KIRO originally filed two sets of interrogatories and requests for production of documents on

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December 2, 1981 and January 5, 1982. A motion to compel answers was initially brought on January 26, 1982. In response, appellants amended their answers. Thereafter, negotiations and repeated threats to file a motion to compel by KIRO resulted in further inadequate responses to the interrogatories. Between June and September, 1983, several court hearings were held. In August, the trial court ordered appellants to produce the three tapes on or before September 6, 1983 subject to the protective or order. At that hearing, the trial court said it would entertain any other objections not brought out at the hearing. Appellants refused to comply and failed to offer any other reasons for their noncompliance. Their behavior was willful and deliberate. Without these documents the respondents' defense of some of the issues

APPENDIX A:
ORDER AFFIRMING TRIAL COURT

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raised in appellants' complaint could have been prejudiced. We find no abuse of discretion by the trial court in dismissing appellants' complaint.

Respondents request attorney's fees incurred in connection with their defense of this appeal. In support of this proposition, they cite Tamari v. Bache & Co. (Lebanon) S.A.C., 729 F.2d 469 (7th Cir. 1984) and Mickwee v. Hsu, 753 F.2d 770 (9th Cir. 1985) both of which upheld the imposition of attorney's fees on appeal under Fed. R. Civ. P. 37(b).

We find the holding in Basch v. Westinghouse Elec. Corp., 777 F.2d 165 (4th Cir. 1985), denying the award of attorney's fees the better rule in light of the faccts of the case at bar. In Basch, the court stated:

> The present case, however, does not present an appropriate occasion to penalize counsel for having taken an

APPENDIX A:
ORDER AFFIRMING TRIAL COURT

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> appeal from the district court's sanction. Seidenman's appeal, although found to be without merit, was not frivolous nor was it interposed to harass defendant or to delay implementation of a valid discovery order.

Basch, at 175. Similarly, the instant case presented an appeal found to be without merit but not one that this court can deem frivolous or interposed to harass or for purposes of delay. Tamari; see also Streater v. White, 26 Wn. App. 430, 613 P.2d 187 (1980). The request for fees on appeal is denied.

The trial court is affirmed.

WE CONCUR:

_____ _____

APPENDIX A:
ORDER AFFIRMING TRIAL COURT

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation, Appellants, WILLIAM R. POWERS and LILA LEE POWERS, husband and wife, d/b/a POWERS STUDIO, Plaintiffs, vs. KIRO INC.; FISHER BROADCASTING, INC., and KOMO; JOHN SANDIFUR and JANE DOE SANDIFUR, husband and wife; Respondents, TRIBUNE PUBLISHING CO., INC.; RICHARD SYPHER and JANE DOE SYPHER, husband and wife; JOAN DUMENCHUK and JOHN DOE DUMENCHUK, wife and husband; and STARR ELLIOTT, Defendants.	No. 13848-1-I DIVISION ONE ORDER DENYING APPELLANTS' MOTION FOR RECONSIDERATION

The appellants, Keith Milton Rhinehart and the Aquarian Foundation, having filed a motion for reconsideration herein,

APPENDIX B:
ORDER DENYING APPELLANTS' RECONSIDERATION

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and the court having determined that it should be denied; now, therefore, it is hereby

ORDERED that the appellants' motion for reconsideration be, and the same hereby is, denied.

DATED this 11th day of September, 1986.

Acting Chief Judge

APPENDIX B: ORDER DENYING APPELLANTS' RECONSIDERATION

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THE SUPREME COURT OF WASHINGTON

KEITH MILTON RHINEHART, and THE AQUARIAN FOUNDATION, Petitioners, vs. WILLIAM R. POWERS, et al., Respondents.	No. 53487-0 Court of Appeals No. 13848-1-I **ORDER DENYING PETITION FOR REVIEW**

This matter having come on before the Court on its March 31, 1987, Motion Calendar on Petitioner's Motion for Extension of Time to File Petition for Review and the Petition for Review. The Court having considered the motion and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petitioner's Motion for Extension of Time to File Petition for Review is granted and the Petition for Review is denied on the merits.

APPENDIX C: **ORDER DENYING PETITION FOR REVIEW**

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DATED at Olympia, Washington this

31st day of March, 1987.

_____

CHIEF JUSTICE

APPENDIX C: **ORDER DENYING PETITION FOR REVIEW**

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a not-for-profit corporation; WILLIAM R. POWERS and LILA LEE POWERS, husband and wife, d/b/a POWERS STUDIO, Plaintiffs, vs. KIRO, INC.; FISHER BROADCASTING, INC., and KOMO; TRIBUNE PUBLISHING CO., INC.; RICHARD SYPHER and JANE DOE SYPHER, his wife; JOHN SANDIFER and JANE DOE SANDIFER, his wife; JOAN DUMENCHUK and JOHN DOE DUMENCHUK, her husband; and STARR ELLIOTT, Defenants.	No. 81-2-16020-4 **NOTICE OF APPEAL TO COURT OF APPEALS, DIVISION I** Filed October 10, 1983

Keith Milton Rhinehart, a single person, and the Aquarian Foundation, a Washington not-for-profit corporation, Plaintiffs seek review by the designated appellate court of the final judgment of dismissal of Plaintiffs' claims against

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defendant KIRO, Inc., and the final judgment of dismissal of claims of Plaintiffs Keith Milton Rhinehart and the Aquarian Foundation against Fisher Broadcasting, Inc., KOMO, John Sandifer and Jane Doe Sandifer, his wife, both entered on September 23, 1983.

Plaintiffs Rhinehart and the Aquarian Foundation also seek review of the following orders:

Order	Date of Entry
Order Denying Reconsideration of Protective Order	... 09/23/83
Order of Dismissal(KIRO)	... 09/23/83
Order of Dismissal (Fisher Broadcasting, KOMO, and Sandifer	... 09/23/83
Order Compelling Production and Imposing Sanctions for Failure to	

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Make Discovery; Protective Order ... 09/19/83

Order Compelling Production, Granting Terms, and Limited Protective Order ... 09/19/83

Oral Decision of Honorable Liem E. Tuai ... 08/11/83

Order Compelling Discovery and Assessing Terms ... 06/06/83

DATED: October 10. 1983 EDWARDS AND BARBIERI

By_____
Charles K. Wiggins
Attorneys for Appellants and for Plaintiffs/William R. Powers and Lila Lee Powers, husband and wife, d/b/a Powers Studio

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APPENDIX D: **NOTICE OF APPEAL**

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Counsel for Defendant Star Elliott

D/7616E

APPENDIX D: **NOTICE OF APPEAL**

NO.

IN THE SUPREME COURT FOR THE UNITED STATES OF AMERICA
TERM

KEITH MILTON RHINEHART and the AQUARIAN FOUNDATION,

Petitioners,

vs.

TRIBUNE PUBLISHING COMPANY, INC., et al.

Respondents.

NOTICE OF APPEAL

RECEIVED
JUN 25 1987
Preston, Thorgrimson, Ellis & Holman

To: The Clerk of the Court

And To: Gordon Conger, Preston, Thorgrimson, Ellis & Holman, Attorney for Respondent KIRO, Inc.

And To: Keith A. Bolton of Peterson Lycette & Snook, P.S., Attorney for KOMO, Inc.

Please take notice that the Plaintiff-Appellants Aquarian Foundation and Reverend Keith Milton Rhinehart are filing an appeal with the United States Supreme Court of the decision by the Washington State Supreme court March 31, 1987, denying their Petition for Discretionary Review. Appeal is taken

APPENDIX E: PROOFS OF SERVICE-33

No.

IN THE SUPREME COURT FOR THE UNITED STATES

OF AMERICA
TERM

KEITH MILTOM RHINEHART and the AQUARIAN FOUNDATION,

Petitioners,

vs.

TRIBUNE PUBLISHING COMPANY, INC., et al.

Respondents.

RECEIVED
JUN 25 1987
Preston, Thorgrimson, Ellis & Holman

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

APPENDIX E: PROOFS OF SERVICE-34

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(206) 223-1888

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IN THE SUPREME COURT FOR THE UNITED STATES OF AMERICA

KEITH MILTON RHINEHART and the AQUARIAN FOUNDATION, Petitioners, vs. TRIBUNE PUBLISHING COMPANY, INC., et al. Respondents.	NOTICE OF APPEAL

To: The Clerk of the Court

And To: Gordon Conger, Preston, Thorgrimson, Ellis & Holman, Attorney for Respondent KIRO, Inc.

And To: Keith A. Bolton of Peterson Lycette & Snook, P.S., Attorney for KOMO, Inc.

Please take notice that the Plaintiff-Appellants Aquarian Foundation and Reverend Keith Milton Rhinehart are filing an appeal with the United States Supreme Court of the decision by the Washington State Supreme court March 31, 1987, denying their Petition for Discretionary Review. Appeal is taken

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MAY 15 1987
PETERSEN MOORE & GIBSON P.S.

3

No.

IN THE SUPREME COURT FOR THE UNITED STATES OF AMERICA
TERM

KEITH MILTOM RHINEHART and the AQUARIAN FOUNDATION,

Petitioners,

vs.

TRIBUNE PUBLISHING COMPANY, INC., et al.

Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

Counsel for Appellant:

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JURISDICTIONAL STATEMENT

APPENDIX E: PROOFS OF SERVICE-36

LAW OFFICES OF
JEAN SCHIEDLER-BROWN P.S.
501 Melbourne Tower 1511 Third Ave.
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(206) 223-1888

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APPENDIX E: PROOFS OF SERVICE-37

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APPENDIX E: PROOFS OF SERVICE-38